Supreme Court, U.S.
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No. 96-1605
No. 96-1637

In The

Supreme Court of the United States

October Term, 1996

BEAR VALLEY CHURCH OF CHRIST,
a non-profit Colorado corporation,
Petitioner,

v.

DENISE DeBOSE and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose, and HOMER WOLFE,
Respondents.

HOMER WOLFE,
Petitioner,

v.

DENISE DeBOSE, JOHN DEBOSE, and BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,
Respondents.

On Petitions For Writ of Certiorari To The Supreme Court of Colorado

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a church organization or its minister is exempt from tort liability for secular conduct that does not burden the free exercise of religion, and no record evidence indicates that the petitioners' tortious conduct was rooted in any religious belief.

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OPINION BELOW

The opinion of the Colorado Supreme Court (Pet. App. A to Bear Valley's petition) affirming a jury verdict in favor of respondents Denise DeBOSE and J.D.B. is reported at *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996). The Colorado Supreme Court denied Petitions for Rehearing on January 13, 1997. Pet. App. B.

JURISDICTION

The petitioners invoke the jurisdiction of this Court under 28 U.S.C. Sec. 125(3), through two separate Petitions, 96-1605 and 96-1637.

STATEMENT OF THE CASE

Respondents, Denise DeBose and J.D.B., filed suit against the Bear Valley Church of Christ ("Bear Valley") and Homer Wolfe ("Wolfe"), a Bear Valley minister. Their claims against Wolfe included breach of fiduciary duty, and outrageous conduct based on the minister's sexual touching of minor child J.D.B. that grew out of Wolfe's counseling of the child. Their claims against Bear Valley included breach of fiduciary duty, outrageous conduct, and negligent hiring and supervision based on the antecedent knowledge of Bear Valley that Wolfe had sexually approached other

vulnerable children. The tortious conduct aggravated preexisting physical and emotional conditions causing the DeBoses to become ill.

The jury returned verdicts of breach of fiduciary duty against both petitioners and for both respondents. In addition, verdicts of outrageous conduct and negligent hiring or supervision were returned for the minor child, as set forth in Pet. App. C to Bear Valley's petition. The jury also found that the statute of limitations on the negligence claim had expired as to Denise DeBose.

The facts underlying the DeBoses' claims are recounted in the opinion of the Colorado Supreme Court, Pet. App. A at 2a-10a. The DeBoses incorporate those facts by reference. No evidence connected touching genitals or rubbing thighs with religious motivation.

Four sets of facts alleged by Bear Valley in its petition are incorrect.

First, at page 5, Bear Valley quotes at length J.D.B.'s testimony that he did not recall seeing Wolfe in 1987 or 1988, and apparently extrapolates from that testimony an incorrect "fact" that no counseling sessions, and therefore no sexual contact, occurred in those years. Bear Valley ignores the undisputed evidence of others, including Wolfe, that he counseled the child with increasing frequency into 1988. Wolfe's calendar (Trial Exhibit 9) recorded 1988 sessions as twice in January, twice in February, three times in March, three times in April and once in May.

Second, at footnote 6, Bear Valley contends that the minor child alleged "only one incidental contact with his genitals." The record is exactly the opposite. As set forth in pages 3a-4a of Pet. App. A, at trial the child related that Wolfe regularly "would rub my leg up to my side and just touch my penis" and his "privates." Bear Valley's claim at footnote 6 that the boy's comments to Dr. Henry Frey, a psychiatrist who conducted an independent examination for Bear Valley, was "180 degrees" different from the child's testimony at trial is also inaccurate. J.D.B. told Dr. Frey that Wolfe required him to take his shirt off, and that Wolfe's rubbing of the child, including under his shorts, was "like caressing." XIII:142. Dr. Frey never asked the child where Wolfe had touched him, and J.D.B. did not volunteer that information to Dr. Frey.

Third, Bear Valley's assertion at page 28 that there were no allegations of misconduct against Wolfe before he was fired in 1988, is in error. In its minutes of April of 1986, the elders questioned Wolfe's "medical counseling." Ex. 4a Tab 5(l). In addition, in June of 1987, Gary and Mary Wygal told the elders directly that Wolfe had asked their fourteen year old son to expose his genitals to Wolfe during counseling. VIII: 9-12. Through 1987, Wygal continued to complain to the elders about Wolfe's unusual touching of children. VIII: 35-40. In early 1988, another father, Owen Dean, told the elders that his son had been inappropriately touched by Wolfe. XII: 30. After talking with the boy, the Wygals told the elders that Wolfe had asked to physically examine David Dean, and wanted "to get into his (Dean's) pants with his hands." VIII: 27-28; 186.

Fourth, Bear Valley claims that it discontinued Wolfe's counseling of children in March of 1988, when a letter was sent to Wolfe to that effect. The elders did nothing to tell the congregation of the suspension. XII:169 and XIII:110. The elders almost immediately reinstated his counseling duties without investigation, and children including DeBose continued to receive counseling from Wolfe through June of 1988. IX:99-100.

Facts alleged by Wolfe in his petition are also incorrect.

First, at page 10, Wolfe says that he has always maintained that "any touching of John DeBose was religiously motivated." In fact, both before and during trial, Wolfe denied ever touching J.D.B. The massage that he described giving other children, according to Wolfe, was aimed at communication. However, as to J.D.B., the following question and answer were given at trial by Wolfe:

> Q. Didn't you massage that boy?
>
> A. I did not.

XIII:53: ll. 2-3. Wolfe testified specifically that he would not have massaged J.D.B. because it would not have provided any benefit to the boy. XIII:48.

Second, at page 6, Wolfe claims that, at trial, he "explained the religious underpinnings" of the techniques which he employed for inspection of the genitals of adolescent counselees. Wolfe cites 13:53:ll.7 - 54:ll. 5. The testimony referenced by Wolfe has nothing to do with

religious support for his technique of inspecting the genitals of adolescent counselees. Following is the testimony which Wolfe cites to explain his "religious underpinning":

> Q With Wade Wright, how did it come up to check Wade's circumcision? Did he bring it up?
>
> A. During the massage period I was talking to him constantly, and the whole purpose of it was for the purpose of concentrating on communication, and he was about to leave town. I wanted to have one last encouragement session to encourage him. He was a very good boy. I had a lot of respect for him. He had a great future ahead of him. I just wanted to talk to him about living a good Christian life, staying close to God, and talk to him about -- talk to him about dating, talk to him -- I don't remember the specifics. All of it was about things that would occur to him in connection with dating, and I urged him to watch out for the normal temptations.
>
> Q. And that's how checking his genitals -- to encourage him to watch out for temptations?
>
> THE COURT: You need to speak up a little bit, sir.
>
> A. There were occasions that it might be helpful for me to explore that part of his area of his life.
>
> Q. The genital area of his life? What area of his life were you exploring by checking his genitals.
>
> A. His sexuality and development sexually.

Wolfe's own citation to the record shows that he never posited a religious belief for the nudity and massage that he employed in counseling of Wade Wright or any other child.[1]

The Colorado Supreme Court determined that the evidence at trial was sufficient to support the DeBoses' claims for breach of fiduciary duty, outrageous conduct, and negligence in hiring and supervision.

The Colorado Supreme Court found that neither Wolfe nor the Bear Valley Church of Christ had asserted at trial that the tortious conduct complained of -- *i.e.*, Wolfe's touching of the genitals of J.D.B. and Bear Valley's decision to keep Wolfe's methods secret from the congregation, were motivated by any religious belief.

Rather, Bear Valley argued that the First Amendment to the United States Constitution prohibits subject matter jurisdiction where clergy hiring and supervision are involved, which argument was rejected by the Colorado Supreme Court. Homer Wolfe similarly argued that the First Amendment to the U. S. Constitution prohibits subject matter jurisdiction where the clergy provided counsel to a parishioner, which argument was also rejected by the Colorado Supreme Court.

[1]Wade Wright testified that Wolfe "felt my penis and genitals" for 20 to 30 seconds and that Wolfe "said that the doctors did a good job in circumcision." X:13, 18.

REASONS FOR DENYING THE PETITION

I. This case is not worthy of certiorari review because the Colorado Supreme Court's holding is consistent with this Court's well-established precedents.

The decision of the Colorado Supreme Court in this case raises no unsettled issue of federal law. The Colorado court followed well-settled decisions of this Court in holding that laws burdening conduct not proven to be rooted in religious belief do not violate the First Amendment's free exercise clause.

Neither the Church of Christ nor Homer Wolfe can argue that the Colorado Supreme Court ought to have examined evidence concerning the actual impact of tort liability on religious belief. Such weighing of evidence in this case is impossible because neither the Church of Christ nor Wolfe presented evidence showing whether and how their tortious conduct was required by their specific religious belief. The argument at trial, rather, was much as it is to this Court: Religious organizations and their ministers should be exempt from tort liability.

A. The Colorado Supreme Court followed well-settled decisions of this Court in holding that legal restriction of "secular conduct" not proven to be rooted in religious belief does not burden the free exercise of religion.

The Church of Christ has never provided record evidence or even specific allegations showing that its tortious conduct was rooted in any religious belief. Similarly, Wolfe has never provided record evidence or specific allegation showing that his tortious conduct was rooted in any religious belief. He claimed generally that his counseling was "biblically based", but failed to provide any religious motivation for the techniques that he used. Based on this record, the Colorado Supreme Court applied well-settled law to hold that the judgment in this case did not burden the free exercise of religion. This holding is consistent with every decision by this Court. It also raises no important or unsettled principle of constitutional law. Therefore, this Court should deny both Bear Valley's petition and Wolfe's petition.

This Court has long held that conduct is not "exercise of religion" unless the conduct is mandated by sincerely held religious belief. *See, e.g., Frazee v. Employment Security Dep't*, 489 U.S. 829, 834 (1989)(to prove violation of free exercise clause, litigant must show that burdened conduct "was based on a sincerely held religious belief"); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)(law does not burden free exercise rights unless it has a "tendency to coerce (Homer Wolfe and the Bear Valley Church) into

acting contrary to their religious beliefs"); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987)(burdened conduct must be "mandated by religious belief" to be protected by free exercise clause)(quoting *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981)); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)("to have protection of the Religion Clauses, claims must be rooted in religious beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

The party claiming a constitutional violation has the burden of proving that violation. Neither Bear Valley nor Wolfe have shown that conduct at issue was religious. Under all of this Court's well-established free exercise precedents, the First Amendment provides no defense to tort liability unless the specific tortious acts were actually "mandated by religious belief." *Hobbie*, 480 U.S. at 141. The Church of Christ and Wolfe have the burden of proving with record evidence that tortious conduct and religious belief are "inseparable and interdependent." *Yoder*, 406 U.S. at 215.

Bear Valley's claim at page 14 of its petition, that "the Colorado Supreme Court has entirely disregarded this (the compelling state interest) test," is inaccurate. The first question to be asked in deciding whether or not to consider applying a compelling state interest test is whether the conduct at issue is motivated by a religious belief. *Yoder, supra*, 406 U.S. at 215. Because neither Wolfe nor Bear Valley asserted religious motivation for the tortious conduct at issue, the Colorado Supreme Court properly held that there was no basis on which to consider a compelling state interest analysis. Pet. App. A, 11a-12a. The essence

of Bear Valley's argument is that, because it is a religious organization, everything it does must be motivated by religious belief. There is no testimony that the specific tortious conduct complained of -- Bear Valley's decision to keep secret from the congregation that their minister had been accused of sexually abusing children; the decision to tell those accusing the minister to keep the secret in order to allow Bear Valley to control the information; the decision to allow the minister to continue his methods without supervision and without investigation -- were motivated by any religious belief. Bear Valley's antecedent knowledge of the danger posed by Wolfe, not any religious belief, provided a basis for the tort claims against Bear Valley.

Moreover, mere assertion that a law burdens some practices that might conceivably be religious has never sufficed to show a violation of the free exercise clause. The party asserting a defense based on the free exercise clause has the burden to show with record evidence that his or her conduct is mandated by a sincere religious belief. *Yoder*, 406 U.S. at 215. *See* also *Messiah Baptist Church v. County of Jefferson, Colorado*, 859 F.2d 820 (10th Cir. 1988)(free exercise clause challenge to zoning ordinance requires "evidence in the record" that location of church "is integrally related to underlying religious beliefs.") The Free Exercise Clause of the First Amendment does not grant churches immunity from being sued in civil courts. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U. S. 619 (1986).[2]

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[2]Assuming the Church of Christ or Wolfe had established religious motivation, the free exercise clause would not bar Colorado from

The Church of Christ reliance on *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993), at pages 14 through 16, and Wolfe's reliance on the same case at page 16 of his petition, are misplaced. In that case, there was no question but that the conduct at issue was religiously motivated -- record evidence showed that the conduct being regulated involved a specific religious ceremony. The question then turned to whether the law at issue was aimed at prohibiting that specific religious practice, which it clearly was. Equating a municipal ordinance specifically designed to prevent a religious practice with the neutral application of common law is nonsensical. In *Church of Lukumi*, this Court noted that the inquiry to determine whether a law was neutral is whether the "object of the law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 2227. If the answer is "yes", the law is not neutral and requires a compelling state interest test. The object of the torts of negligence and breach of fiduciary duty is to provide compensation to plaintiffs injured by the tortious conduct of another. The torts are religion neutral and, even assuming the conduct at issue had been tied to religious belief, the First Amendment would be no defense pursuant to *Smith.*

At pages 19 and 20, the Church recasts DeBoses' claims into claims in which a civil court decided selection of clergy. The recasting is inaccurate. Consistent with federal and Colorado law, DeBoses' verdicts did not intrude into

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enforcing generally applicable religiously neutral rules that prohibit or burden even religiously motivated conduct. *Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

the clergy selection process. They addressed only the decision by the Chruch of Christ to retain Wolfe in a position where he was given intimate access to young children in a counseling setting, when the Church had been directly told that his history placed those children at risk. By way of analogy, the same analysis would have applied if the Church had allowed Wolfe to drive buses filled with parishioners in situations where the Church knew that Wolfe had a history of driving carelessly. Freedom to select clergy is protected. Decisions by a religious employer to allow clergy involved in secular conduct to harm unsuspecting third parties, is not protected.

At pages 11 through 15 and 25-26 of the Bear Valley petition, the Church criticizes the Colorado Supreme Court generally for perceived internal inconsistencies in cases which that court has decided. A review of the cases cited shows that the Colorado court carefully and appropriately decided the cases cited by Bear Valley. *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996), involved a minister who sued her church concerning her ministry. The Colorado Supreme Court held that the choice of minister is protected. Nothing in that decision runs contrary to this Court's jurisprudence, or to the Colorado Supreme Court rulings in *Moses v. Diocese of Colo.*, 863 P.2d 310 (Colo. 1993), *cert. den.*, ____U.S. ____, 114 S.Ct. 2135 (1994), *DeStefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) or *Bohrer v. DeHart*, ___ P.2d ___ (Colo. App. 1996). In distinguishing the negligence claims from internal church conflicts, the *Van Osdol* court stated in footnote 17:

> "(T)he court...looks to whether the specific danger which ultimately manifested itself could have

> reasonably been foreseen at the time of hiring. This inquiry, even when applied to a minister employee, is so limited and factually based that it can be accomplished with no inquiry into religious beliefs."

Indeed, in *Bear Valley*, there was no inquiry into religious beliefs at either the trial or appellate stages of the action.

Bear Valley contends at page 8 that the State of Colorado is required to restrict its breach of fiduciary duty claim to claims involving financial affairs. Wolfe's petition mirrors that claim at page 27. The essential premise of the argument is that when a clergyman is sued for breach of fiduciary duty other than conduct involving taking money, it is his status as a clergyman which gives rise to the fiduciary duty. This premise was directly addressed in *DeStefano* and in *Moses*. When applying the neutral common law tort of breach of fiduciary duty, the relevant inquiry is "not the profession of the defendants. The relevant facts are that the defendants . . . occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty." *Moses, supra*, footnote 13.[3]

Since neither defendant presented evidence that the conduct at issue was mandated by a religious belief, the argument about the minister's status is irrelevant. In fact, the record actually shows that Homer Wolfe's conduct was contrary to the church's religious beliefs, as discussed in

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[3]The briefs by both Bear Valley and Wolfe allege that the Colorado Supreme Court erred when it decided the *Moses* case. This Court declined to review the decision of the Colorado Supreme Court in that case in 1994 at 114 S.Ct. 2153.

I(B)(i.), *infra*. However, assuming that Bear Valley or Wolfe had shown that a minister's status required him to abuse children, the result here would be the same because the torts at issue are neutral laws of general applicability. The Colorado Supreme Court has recognized that, under appropriate circumstances, a clergyman may, but need not be, in a position of trust, just as, depending upon the circumstances, a wide range of persons may seek positions of trust. *See, Moses, supra*, and *DeStefano, supra*. The "status" involved is not clergy or non-clergy; it is a person in authority who seeks a special trust such that another has the right to rely on the fiduciary.[4]

The torts at issue are neutral laws of general applicability, both on their face and in their application. It is not the status of "minister" that creates the duty, it is the act of a person in a position of superiority offering help to a person who is vulnerable such that the person in the position of superiority assumes a duty to act in good faith. An identical result would have been reached in this case if the Church had been a non-religious employer, such as a day care center or a hospice, whose dangerous employee

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[4]At pages 11 and 12, Bear Valley cites a variety of Colorado cases which hold that, where a professional negligence claim is based on exactly the same evidence as a breach of fiduciary duty claim, the two claims are duplicitous. The same cases are cited by Wolfe at page 28 of his petition. In *Crystal Homes v. Radetsky*, 895 P.2d 1179 (Colo. App. 1995), an attorney's fiduciary obligations were based entirely on his attorney-client relationship; in both *Awai v. Kotin*, 872 P.2d 1332 (Colo. App. 1993) and *Spoor v. Serota*, 852 P.2d 1292 (Colo. App. 1992), *cert. denied* (1993), the doctor's fiduciary obligations were based entirely on his doctor-patient relationship. Those cases are irrelevant to the issues raised here.

provided damaging care or counseling to a vulnerable person.

None of the claims were predicated on actions motivated by religious belief: The negligence claim was based on prior notice to the Church of the danger Wolfe posed; the breach of fiduciary duty claim was based, not on how Wolfe was treated, but on how the DeBoses were treated by entities that sought and then betrayed their trust; the outrageous conduct claims were based on damaging actions taken with full knowledge of the vulnerability of the DeBoses.[5]

The holding by the Colorado Supreme Court in *Bear Valley* is consistent with every decision of this Court. It presents no unsettled or important questions of federal law. Therefore, the petition of the Bear Valley Church of Christ should be denied.

B. Because neither Bear Valley nor Wolfe presented record evidence concerning how

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[5]Wolfe claims at page 28 that the outrageous conduct tort stems from Wolfe's status as a clergyman. The jury instruction is included in Exhibit Z to Wolfe's petition. In fact, the tort is independent of Wolfe's status as a minister. In counseling both Denise DeBose and her son, Wolfe learned that J.D.B. had been abused before the child began counseling and that the child had emotional problems. As the instruction reads: "The extreme and outrageous character of conduct may arise from a person's knowledge that another is peculiarly susceptible to emotional distress because of some physical or mental condition or peculiarity." Wolfe's actions based on his knowledge of the frailties of both J.D.B. and Denise DeBose, not based on any ministerial status, formed the foundation of the outrageous conduct liability.

tortious conduct was required by any sincerely held religious belief, this case presents no important or unsettled federal question concerning the actual impact of tort liability.

The Colorado Supreme Court correctly posed the threshold question for any defense predicated on the free exercise clause: Did Wolfe or Bear Valley assert a religious basis for their tortious conduct? Bear Valley's Pet. App. A, 11a-12a. Based on the trial court record, the court concluded that neither Bear Valley nor Wolfe had ever articulated how specific tortious actions were motivated by a deeply held religious belief. At pages 14 and 15, Bear Valley criticizes the Colorado Supreme Court for failing to apply a compelling state interest test where neither Bear Valley nor Wolfe provided evidence on which to apply the test, as was their burden.

i. Bear Valley presented no evidence that its tortious conduct was religiously motivated.

At page 23, Bear Valley claims, for the first time in this litigation, that "laying on of hands" is a "sacred communication of pastoral counseling." At every level of the litigation in the lower courts, Bear Valley has contended that any touching by Wolfe of counselees was not motivated by nor part of any religious belief held by Bear Valley. Indeed, at trial, Bear Valley claimed that it ordered Wolfe to refrain from "medical counseling" after it learned that Wolfe had been checking the genital development of boys. One elder testified that Bear Valley "absolutely" did not

approve of Wolfe's methods (XII:23) and that Wolfe had not raised a religious belief when the elders told Wolfe to stop touching children. Wolfe simply agreed to stop. XII:31. That elder testified that Wolfe's counseling should not have included "any type of physical activity that would require looking, discussing, anything to do with the young man's personal development . . .". XII:49. Another elder testified that Wolfe's counseling was to have been limited to spiritual counseling and that the allegations of physical contact made against Wolfe were outside of Bear Valley's beliefs. XII:80-82. In contrast to claims made by Bear Valley in the lower courts, Bear Valley's current claim that the "laying on of hands" justified Wolfe's conduct, hints, but never says directly that the "laying on of hands" has a religious motivation and would, in some undefined way, extend to "laying hands" on the genitals of children.

Testimony given in the trial court is not the only arena in which Bear Valley condemned Wolfe's conduct as totally unrelated to any religious belief of Bear Valley. In its Opening Brief to the Colorado Supreme Court, Bear Valley asserted repeatedly that the elders ordered Wolfe to refrain from the clinical counseling because it was inconsistent with its religious beliefs.

Bear Valley presented no evidence that any of the specific tortious actions complained of against Wolfe or Bear Valley were either mandated by or prohibited by their religion. There is no religious mandate about keeping secret sexual abuse by its ministers. There is no mandate or prohibition about deceiving and manipulating vulnerable parishioners. In place of a specific articulation of how the acts complained of were mandated by a religious belief,

there is a presumption that, because Wolfe is a minister and Bear Valley religious organization, all actions are religious.

There is no claim anywhere in the record that a religious belief involving "laying on of hands" mandated Wolfe's conduct. Even Wolfe has never raised such a religious mandate. Because of lack of proof that the tortious actions were motivated by religious belief, the Colorado Supreme Court properly found that Wolfe's and the Church's First Amendment defense was merit less.

Because Bear Valley has not alleged -- let alone proven -- that specific tortious acts were "mandated" by religious faith, it has not properly alleged a defense to tort liability under the First Amendment. Specifically, it has never argued at trial or in any of the briefs that its religious faith requires it to (1) authorize ministers who required children to undress and reveal their genitals to provide counseling to psychologically vulnerable parishioners; or (2) allow such ministers to engage in touching the thighs, backs and genitals of minor parishioners.

The Church has never articulated a religious motivation or substantial burden to exercise of religion that could provide the prerequisite of the compelling state interest analysis it requests.

ii. Wolfe presented no evidence that his tortious conduct was religiously motivated.

Unlike Bear Valley, which defended its actions at trial based on Wolfe's conduct being at odds with its

religious belief, Wolfe himself was silent about motivation for his actions, beyond claiming that his counseling was "biblically based," without ever referencing how partial or total nudity, massage or examination of genitals were mandated by any religious belief.[6] He identifies some conduct that may have been religious. The tortious actions at issue, however, were not. Wolfe claims that everything he does is religious conduct; everything he believes is a religious belief.

Wolfe testified that he learned the techniques of touching, not from any religious dogma or text, but from using massage techniques on his sons to help them communicate. Pet. App. A, 14a. He testified that he learned his theory behind having counselees take off their clothing, not from any religious dogma or text, but from a book, *The Gift of Sex*. IX:75-76.

At Wolfe's Appendices E through N, he attaches every pre-trial motion and argument in which he claimed that the First Amendment prohibited subject matter jurisdiction. Never once did he raise a religious basis for his actions. Prior to trial, Wolfe listed 14 affirmative defenses. None concerned any alleged religious motivation for touching children.

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[6]Any biblical basis for Wolfe's techniques was never shared with the parents of the children he touched. He claims that his non-disclosed, post lawsuit-professed beliefs allowed him to touch children without consent of parents and without any authentic consent from the children because of their age.

Wolfe was told in 1988 by the elders to stop touching the "Dean boy." He stopped and asserted no burden to his beliefs. Nothing in the record suggests that his touching of J.D.B. was more religious than his touching of the "Dean boy." Free exercise defenses to common law liability are necessarily dependent on specific facts developed at trial, and the burden of proving with record evidence that the tortious conduct and religious belief are interdependent is with the entity asserting the defense. *Yoder*. 406 U.S. at 215.

Whether Wolfe's beliefs were religious is a legal question to be determined by the court. *United States v. Seeger*, 380 U.S. 163 (1965). Because there was no evidence that the touching, massage and fondling of J.D.B. by Homer Wolfe was motivated by any deeply held religious belief the trial properly made that determination as a matter of law.

As Wolfe states in his petition, he presented no record evidence to the Colorado Supreme concerning a religious mandate for his conduct. In place of record evidence, Wolfe asked the Colorado Supreme Court to treat as a "given" that his tortious conduct was religiously motivated,[7] which the Colorado Supreme Court refused to do.

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[7]Wolfe raises The Religious Freedom Restoration Act , 42 U.S.C. Sec. 2000bb (1993). As discussed above, Wolfe has raised no religious belief which could form the basis of the compelling state interest test required by RFRA. Accordingly, RFRA is facially inapplicable.

The Colorado Supreme Court properly denied certiorari review on the Establishment Clause of the First Amendment, which denial is criticized generally by Wolfe in his petition. Resolution of this case did not require interpreting and weighing of church doctrine, but rather allowed application of neutral principles of law to determine the liability of the Church. In other words, the Colorado Supreme Court determined that the burdens imposed by tort liability in this case had not been shown to be burdens on anything but secular conduct.[8]

II. The Expert Witness Testimony did not Address Religious Beliefs.

The testimony concerning Wolfe's use of touching and nudity supported claims by the DeBoses that the techniques employed by Wolfe were harmful and inappropriate in any counseling setting. That testimony had nothing to do with questioning dogma, particularly where Bear Valley agreed that the techniques were outside of the expectations of the elders.

Bear Valley misunderstands the testimony of the four experts that are listed at page 26 . Bear Valley says that the first expert, Marie Fortune, was tendered as an "expert in theology." Bear Valley fails to set out the limitation on that

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[8] The Colorado Supreme Courts' holding is consistent with this Court's jurisprudence in *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

expert qualification. Rev. Fortune was qualified "as an expert in theology relative to procedures and practices reasonably necessary in a church setting to prevent foreseeable harm." As the Colorado Supreme Court noted, plaintiff was required under the negligence claim to prove that Bear Valley's supervision of Wolfe caused foreseeable harm. The testimony discussed that foreseeability and had nothing to do with religious beliefs.

The second listed expert, psychiatrist Dr. Morall, gave no opinions on standard of care or on religion. Rather, she testified that it was harmful to remove the shirt of a counselee, remove the pants of a counselee, or rub the thigh of a counselee (VII:75) -- none of which were arguably dictated by any religious belief. Indeed, Bear Valley's own expert, Dr. Frey, testified to the same predictable harm.

The third expert, Randy Sims, the Church of Christ therapist appointed by the elders, testified that the boy had been badly hurt. In addition, after Wolfe had suggested a "biblical basis" for his touching and nudity, without itemizing that basis, Sims rebutted that suggestion, which was consistent with all of the testimony presented by Bear Valley that there was no religious basis within the Church of Christ that justified touching the genitals of children.

The fourth expert, Gary Schoener, did not discuss dogma or philosophy. As Schoener testified, the problem of sexual abuse by clergy in counseling settings is pervasive and non-denominational. VII:57. The expert testimony to which Bear Valley objects provides nothing more than a statement of the position that the elders repeated during

trial. Wolfe had no medical credentials or training which qualified him to touch the genitals of children. Bear Valley reiterated that position at trial, but is critical that witnesses for the Deboses testified to it.

As the Colorado Supreme Court notes at page 21a, the trial court took care to preface the introduction of expert testimony with repeated cautionary instructions limiting the evidentiary use of the testimony. The only questions about general standards of pastoral care posed to any witness, were asked by the defense. VII:150 ll. 23-25; VII:151: ll. 1-12. Likewise, the only questions about religious dogma or philosophy were asked by the defense. VII:162: ll. 10-13. No witness was tendered to render opinions of standard of care. VII:46; VIII;52; XI:11-13.

CONCLUSION

The Colorado Supreme Court's decision correctly applied the legal standards as set forth in decisions by this Court by applying uncontroversial, universally accepted principles of constitutional law. Therefore, this Court should deny the petitions of the Bear Valley Church of Christ and of Homer Wolfe.

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